

Miss Tee Hong Geok, the Deputy Public Prosecutor, on the other hand, submitted that the sentence should not be reduced as it was in no way excessive in view of the seriousness of the offence which the appellant had committed.

On the question of sentence the courts invariably take certain factors into consideration the first and foremost being the public interest. Then the age of the offender, his health, his character and background, the nature of the offence and the circumstances and the manner in which the offence is committed. The courts are duty-bound to consider all these matters before deciding upon a suitable sentence. On an appeal on sentence from the subordinate courts therefore the High Court will not interfere with the sentence imposed unless it can be shown to its satisfaction that in the circumstances of the particular case the sentence was manifestly excessive or inadequate or that in fixing the sentence the subordinate court had failed to adequately consider all relevant factors either for or against the offender.

The appellant is a first offender and by pleading guilty he has no doubt shown some measure of remorse on his part. But on the other hand the offence which he has committed is of such a grave nature that it outweighs the mitigating factors which have been advanced in his favour. The conduct of the appellant can best be described as despicable and wicked for he had very carefully and meticulously executed his nefarious plan to fix up the owners of the two rival restaurants. To satisfy his greed for making more money in his restaurant business the appellant acted in a most malicious and unscrupulous manner without having any regard whatsoever to the tragic consequences which would have followed if the truth had not prevailed. If not for the good investigations which were carried out by the police four innocent persons would have ended up in prison for anything from 3 years to 14 years plus the mandatory 6 strokes of the rotan which is the prescribed punishment for possession of heroin of 5 grammes or more in weight.

There are no merits in this appeal and no extenuating circumstances whatsoever which can be taken in favour of the appellant. The learned President of the Sessions Court considered the case very carefully from every angle and having done so he quite rightly took a serious view and imposed the maximum sentence of 2 years. I can find no

A reason to interfere with the sentence. The appeal is dismissed.

Appeal dismissed.

Solicitors: *Karpal Singh & Co.*

B

NG CHENG KIAT v. OVERSEAS UNION BANK

C

[A.C.J. (Wan Hamzah J.) January 3, 1984]
[Kuala Lumpur – Civil Appeal No. 31 of 1982]

Banking Law – Cheques – Current account – Closing of customer's account – Failure to inform – Subsequent deposit of cash into account – Cheques dishonoured – "Account Closed" printed on Cheques – Whether libellous – Damages – Principles applied in assessing damages

D

Tort – Libel – Dishonour of cheques – "Account Closed" printed on cheques – Words were libellous – Damages – Principles applied.

The plaintiff had a current account with the defendant bank. He had not obtained any overdraft facility from the Bank. He claimed damages against the Bank for failure to honour two cheques drawn by him on that account.

E

The facts of this case were briefly as follows. On November 29, there was a debit of \$4.85 in the plaintiff's account and the Bank closed the account. The Bank, however did not write a letter to the plaintiff to inform him of the closure. On December 7, 1978 the plaintiff received from the Bank Statement of account in respect of November 1978. On December 15, 1979 the plaintiff paid a sum of \$3,200 into his account. On the same day the plaintiff drew 2 cheques, Nos. 488534 and 488535 for the sums of \$1,600.00 and \$582.50 respectively.

F

On December 16, 1978 Cheque No. 488535 was presented at the Bank's counter. It was dishonoured and returned with the words "Account Closed" printed on it. On December 18, 1978 the plaintiff received a letter from the Bank informing him that his account was closed on November 29, 1978. The plaintiff was also asked to call at the Bank so that refund of the deposit of \$3,200.00 could be made to him. On December 19, 1978 cheque No. 488534 was presented to the Bank through the United Asia Bank. It was dishonoured and on the same day it was returned to the United Asian Bank with the words "Account Closed" printed on it. On the same day a cashier's order for the said sum of \$3,200.00 was sent by the Bank to the plaintiff by way of refund.

G

H

I

The learned President of the Sessions Court dismissed the plaintiff's claim and the plaintiff appealed against his decision.

Held: (1) cheque No. 488534 was presented to the Bank after the plaintiff had known that his account had not really been kept open again by the payment of \$3,200.00 cash into the Bank. Therefore, having informed

the plaintiff that the sum of \$3,200.00 had been accepted by mistake, the Bank had no duty to honour cheque No. 488534 when it was presented for payment on December 19, 1978;

(2) as regards cheque No. 488535, the Bank had the duty to honour it after having led the plaintiff to believe (by acknowledging receipt of \$3,200 from him vide pay-in slip butt) that his account was kept open. It was therefore libellous for the Bank to print the words "Account Closed" on it at the time when the Bank had the duty to honour it;

(3) where a customer brings an action against his Bank for wrongfully refusing to pay a cheque which he has drawn, the amount of the damages for breach of contract depends on whether or not the customer is a trader. In an action for breach of contract for wrongfully dishonouring a trader's cheque, the plaintiff is entitled to recover substantial but reasonable damages for injury to his commercial credit, without the necessity of alleging and proving actual damage;

(4) damages were assessed at \$500 against the Bank for breach of contract in wrongfully refusing to honour cheque No. 488535, and \$500 for libel in printing the words "Account Closed" on that cheque and publishing them.

Cases referred to:

- (1) *Wilson v. Midland Bank, The Read Standard* dated October 13, 1961 cited in *J.M. Holden, The Law and Practice of Banking* Volume 1, 3rd ed. (1982) p.85.
- (2) *Baker v. Australia and New Zealand Bank* (1958) N.Z.L.R. 907.

CIVIL APPEAL.

K.S. Low for the appellant/plaintiff.

S. Radhakrishnan for the defendant/respondent.

Cur. Adv. Vult.

Wan Hamzah J.: The Plaintiff was a customer of the Overseas Union Bank (hereafter referred to as the Bank), which is the Defendant in this case; and he had a current account at the Jalan Imbi branch of the Bank and the account number was 2810. He had not obtained any overdraft facility from the Bank. He claimed damages against the Bank for failure to honour two cheques drawn by him on that account. The President of the Sessions Court dismissed the Plaintiff's claim, and the Plaintiff now appeals against the President's decision.

This case can be better understood by tracing the events in chronological sequence. The events were as follows:—

29.11.1978: There was a debit of \$4.85 in the Plaintiff's account and the Bank closed the account. On this date

A the Bank did not write a letter to the Plaintiff to inform him of the closure.

7.12.1978: The Plaintiff received from the Bank statement of account in respect of November 1978.

B 15.12.1979: The Plaintiff paid in a sum of \$3,200 to the Bank. The Bank returned to the Plaintiff the pay-in slip butt Exhibit P2. On the same day the Plaintiff drew the following cheques as "pay cash" cheques:—

Cheque No. 488534 for \$1,600.00

Cheque No. 488535 for \$582.50.

C 16.12.1978: The cheque No. 488535 drawn by the Plaintiff was presented at the Bank's counter by or on behalf of one Siau Chan Leong. The Bank dishonoured the cheque and it was handed back with the words "Account Closed" printed on it.

D 18.12.1978: The Plaintiff received letter (Exhibit P6) dated 15.12.1978 from the Bank informing him that his account was closed on 29.11.1978. In this letter reference was made to the deposit of \$3,200 and the Plaintiff was asked to call at the Bank so that refund of the deposit can be made to him.

E 19.12.1978: The cheque No. 488534 drawn by the Plaintiff was presented to the Bank through the United Asian Bank. It was dishonoured and on the same day it was returned to the United Asian Bank with the words "Account Closed" printed on it. On the same day cashier order for \$3,200 was sent by the Bank to the Plaintiff to return the payment of the same amount which was paid in by the Plaintiff on 15.12.1978.

F The Plaintiff alleged that the Bank had dishonoured the two cheques wrongfully and in breach of its duty to honour, causing the Plaintiff to suffer damage. Further and in the alternative the Plaintiff alleged that the Bank has falsely and maliciously imprinted on the two cheques the words "Account Closed" and published the said words to certain persons, and he had thereby been injured in his credit and reputation of his business and had suffered damage.

H The Bank avers that as the Plaintiff's account was already closed on November 29, 1978 the Bank was in no position to honour the cheques as there was no fund standing to the credit of the Plaintiff in respect of his account. The Bank denies that it published the words "Account Closed" falsely and maliciously. The Bank denies that the words "Account Closed" bore any meaning defamatory or derogatory to the Plaintiff or that they were capable of bearing such meaning.

Evidence shows that there were ample grounds to justify the Bank to close the Plaintiff's account on November 29, 1978. On that date his account

was in debit, and over a period previous to that date the Plaintiff had operated his account in an improper and unsatisfactory manner. In 1978 before December on four occasions the Plaintiff issued cheques of amounts far in excess of the credit balance. Previously, i.e. in 1976, on three occasions the Plaintiff issued cheques of amounts far in excess of the credit balance. As the result many cheques drawn by the Plaintiff were dishonoured.

The Bank alleged that the statement of account in respect of November 1978 which was sent to the Plaintiff consisted of two sheets and in the second (continuation) sheet the words "Account Closed" were imprinted. Therefore it was contended by the Bank that the Plaintiff came to know of the closure when he received the statement of account on December 7, 1978 and that he ought not to have issued the two cheques after he came to know that his account had been closed. The Plaintiff denied that he received the second sheet and alleged that on December 7, 1978 he received only the first sheet (Exhibit P1A), which did not show the words "Account Closed". In the written grounds of decision the President of the Sessions Court stated a finding that the Bank closed the Plaintiff's account without prior notice. The last entry in Exhibit P1A was dated November 8, 1978. The Plaintiff ought to know that Exhibit P1A was not a complete statement of account in respect of November 1978 because it did not show service charge for that month. Therefore he ought to have asked the Bank for a complete statement of account in respect of November 1978. Moreover, the Plaintiff ought to know that at the end of that month his account was in debit, even if he had not received the second (continuation) sheet of the statement of account, because as a customer he was expected to calculate his bank balance himself and should not rely entirely on statement of account supplied by the Bank to find out what the balance was. Therefore I would have held that the Plaintiff ought not to have drawn the two cheques No. 488534 and 488535 and I would have dismissed the Plaintiff's claim had it not been for the reason which I shall presently state.

As I have stated earlier, on December 15, 1978 the Plaintiff paid into the Bank cash amounting to \$3,200 and the Bank returned to the Plaintiff the pay-in slip butt Exhibit P2. This butt bears an acknowledgement in the following words:—

"A/c 2810. Overseas Union Bank Ltd., Jalan Imbi Office, Kuala Lumpur, received for credit of Ng Cheng Kiat cash \$3,200. Kuala Lumpur, December 15, 1978."

- A** Even if the Plaintiff had known that his account had been closed, this butt containing the acknowledgment in such terms must have led the Plaintiff to believe that his account had been kept open again by the Bank's acceptance of the payment of that sum of \$3,200 in cash. Therefore he cannot be blamed for drawing the two cheques on that account, and in my opinion, under such circumstances the Bank had the duty to honour the cheque No. 488535 for \$582.50 when it was presented at the counter on December 16, 1978.
- B** From the evidence it is not clear in which account the Bank first entered the sum of \$3,200 when it was received from the Plaintiff. Probably it was first entered into the Plaintiff's account. According to the Bank's manager (D.W.1) the sum was later transferred to the Creditor's Account. Irrespective of what actually happened, the fact remains that the Plaintiff was informed by means of the pay-in slip butt Exhibit P2 that the sum was being credited to his account. It appears that after the Plaintiff's account had been closed, the Bank's officer concerned made the mistake of accepting the sum of \$3,200 from the Plaintiff believing that the Plaintiff's account was still open. In my judgment, irrespective of the mistake the Bank had the duty to honour the cheque No. 488535 having led the Plaintiff to believe that his account was kept open.
- C**
- D**
- E**
- F** As regards the cheque No. 488534 for \$1,600, in my opinion that cheque was in different position from cheque No. 488535. On December 18, 1978 (i.e. before the cheque No. 488534 was presented to the Bank for payment) the Plaintiff received the letter Exhibit P6 in which he was asked to collect refund of \$3,200 which he had purportedly paid into his account. Therefore on December 18, 1978 the Plaintiff knew of the mistake and the fact that his account had not really been kept open again by the payment of \$3,200 cash into the Bank, and he ought to have taken steps to prevent the cheque No. 488534 from being presented to the Bank for payment. If he had done so the Bank would not have printed the words "Account Closed" on it. Having informed the Plaintiff that the sum of \$3,200 had been accepted by mistake, the Bank had no duty to honour the cheque No. 488534 when it was presented for payment on December 19, 1978.
- G**
- H**
- I**

One question to be considered in this case is whether the words "Account Closed" were defamatory. In *Wilson v. Midland Bank*⁽¹⁾ the customer's cheque was wrongfully dishonoured by the

bank with the answer "no account". The court awarded the customer nominal damages for breach of contract and substantial damages for libel. Therefore in my opinion the words "Account Closed" written on a cheque contrary to the truth would similarly be libellous. As I have indicated, no blame can be attached to the Bank for printing the words "Account Closed" on the cheque No. 488534. As regards the cheque No. 488535, in my judgment it was libellous for the Bank to print the words "Account Closed" on it at the time when the Bank had the duty to honour it.

Where a customer brings an action against his bank for wrongfully refusing to pay a cheque which he has drawn, the amount of the damages for breach of contract depends on whether or not the customer is a trader. In an action for breach of contract for wrongfully dishonouring a trader's cheque, the plaintiff is entitled to recover substantial but reasonable damages for injury to his commercial credit, without the necessity of alleging and proving any actual damage. Irrespective of whether the plaintiff is a trader or not, the following is the rule for assessment of damages for libel as stated by Shorland J. in *Baker v. Australia and New Zealand Bank*⁽²⁾:-

The matters to be taken into consideration in assessing damages are the position and standing of the plaintiff, the nature of the libel, the mode and extent of the publication, the absence of any retraction or apology, and the whole conduct of the defendant from the time when the libel was published, down to the very moment of verdict.

The Plaintiff in the present case is the general manager of Syarikat Hock Guan and assistant managing director of Ng Chee Kuan & Sons Hardware Sdn. Bhd. He is also a director of Waja Steel Sdn. Bhd., Amalgamated Industrial Steel Sdn. Bhd. and managing director of Hock Hup Development Sdn. Bhd. He is also manager of three other companies. He admitted that the Bank's manager apologised to him when he went to see the manager after he came to know that the cheque No. 488534 had been dishonoured. Taking all the circumstances into consideration I assess damages at \$500 against the Bank for breach of contract in wrongfully refusing to honour the cheque No. 488535, and \$500 for libel in printing the words "Account closed" on that cheque and publishing them.

I allow the appeal and order that the damages

A be awarded to the Plaintiff together with the costs here and in the court below.

Appeal allowed.

B Solicitors: *Che Mokhtar Mian Lee & Low, Shearn Delamore & Co.*

PACIFIC CENTRE SDN. BHD. v. UNITED ENGINEERS (MALAYSIA) BHD.

C

[O.C.J. (Edgar Joseph Jr. J.) November 16, December 7 & 8, 1983; January 13, 1984]
[Penang — Civil Suit No. 427 of 1980]

D

Practice & Procedure — Mareva injunction — Application for — Principles applicable — Mareva injunction application distinguished from application under Debtors Act, 1957, s.19.

Practice & Procedure — Mareva injunction — Jurisdiction of Malaysian courts to grant Mareva injunction — R.H.C. 1980, 0.92 r.4 — Courts of Judicature Act 1964, s. 70.

E

Jurisdiction — Mareva injunction — Inherent power of Court to grant Mareva injunction — R.H.C. 1980, 0.92 r.4 — Courts of Judicature Act 1964, s. 70.

F

In this case, an application for *Mareva* injunction was made *inter partes*. This was because it was a sequel to a successful application by the defendants to discharge an *ex parte* order made earlier by the court under section 19 of the Debtors Act 1957.

G

The targets of the said application were two parcels of land belonging to the defendants, or the proceeds of sale thereof, insofar as the same did not exceed M\$16,823,443/- until the hearing of the action or until further order. The two properties were "the Sungei Besi property" and "the Petaling Jaya property".

The parties conceded that the essential elements requiring proof by the plaintiffs were:

- (a) a good arguable case,
- H (b) assets of the defendants were within jurisdiction, and
- (c) a real risk that the defendants will or may remove their assets from jurisdiction or dispose of them within the jurisdiction so as to render them unavailable or untraceable.

I The only issue in this case was with regard to the third element.

Held: (1) no inference that this was not a genuine *Mareva* case could arise simply because the application was made *inter partes*. Indeed, *ex parte* interim or interlocutory injunctions should only be applied for where it is genuinely impossible to give notice without defeating the purpose of the order;